

***United States Court of Appeals
for the
District of Columbia Circuit***



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DISTRICT OF COLUMBIA
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In the Court of Appeals

OF THE DISTRICT OF COLUMBIA.

APRIL TERM, 1913.

No. 2522.

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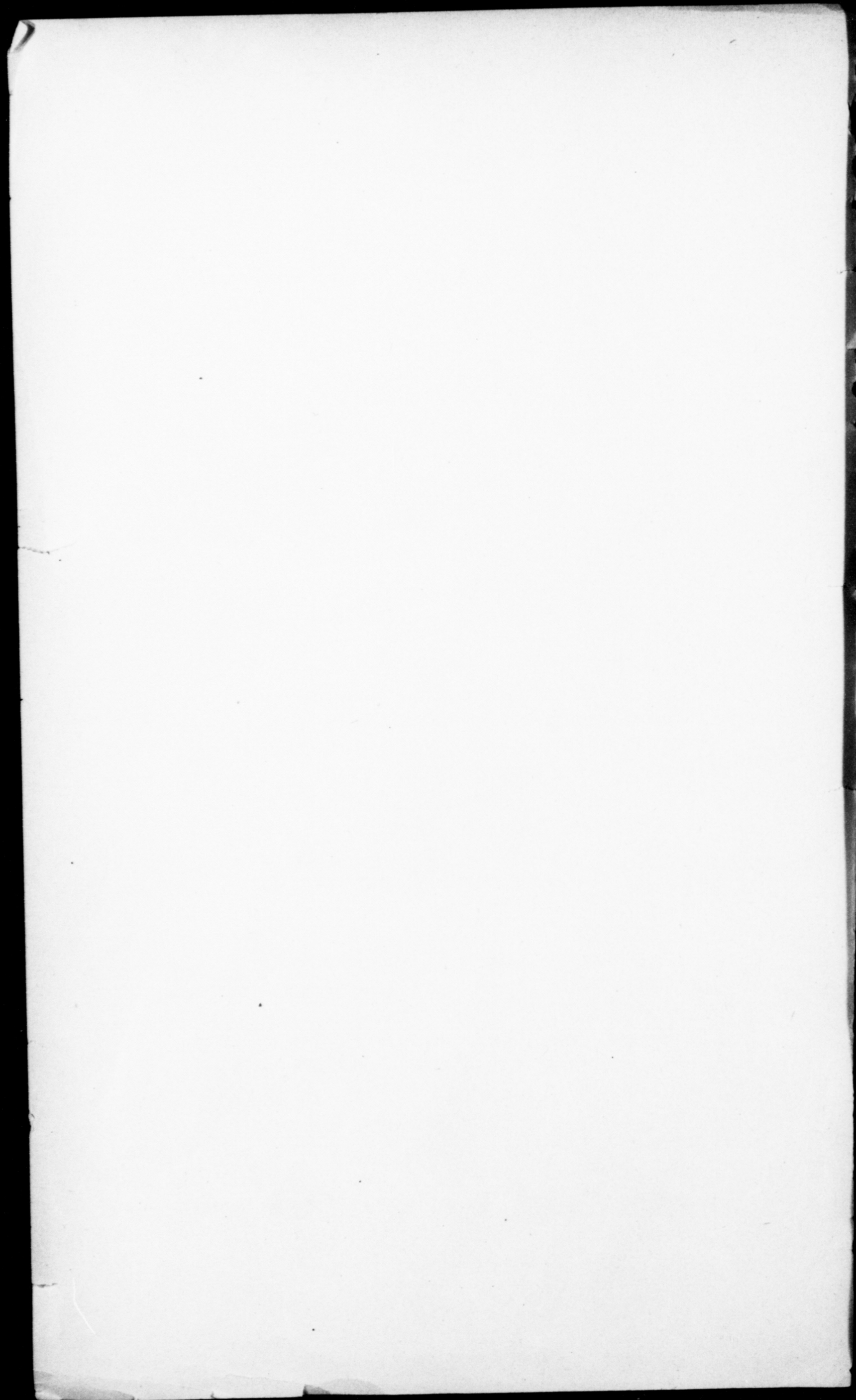
JOHN J. COSTINETT AND JOSEPH R. COSTINETT,
APPELLANTS,

vs.

PLAZA HOTEL COMPANY, A CORPORATION,
APPELLEE.

BRIEF FOR APPELLEE.

GEORGE F. HAVELL,
MICHAEL J. COLBERT,
For Appellee.



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BRIEF FOR APPELLEE.

I.

Statement of Case.

On January 19, 1906, the appellants, the Costinets, leased to the Plaza Hotel Company certain real estate located at the junction of North Capitol Street, F Street, and Massachusetts Avenue, for a term of eight years and six months, beginning from February 1, 1906. At that time the property was improved by a structure used for saloon purposes, but it was in contemplation of both the lessors and lessee that the grade of the three streets bounding this property would be changed by reason of the improvements incident to the completion of the Union Station in the city of Washington. The lease provided that if such change of grade should take place,

the lessors would erect a new building according to plans and specifications to be mutually agreed upon, and that the lessee instead of paying \$150 per month, as provided for in the lease, should pay such sum of \$150 per month plus an additional amount equal to 6 per cent upon the cost of the proposed new building.

The grade of North Capitol Street, F Street, and Massachusetts Avenue was changed and the old building practically buried under ground, and in the month of April, 1907, the lessee requested the defendants to erect a new building as provided for in the lease. Plans and specifications were prepared and mutually agreed upon. This occurred about July 25, 1908, but on or about August 15, 1908, the lessors repudiated the agreement and refused to put up a new building at all, unless the tenant should pay an entirely different rental from that provided in the lease and far in excess of \$150 a month, plus 6 per cent of the cost of the proposed new building. No reason for this refusal was given at the trial and none is stated in the brief of appellants filed in this court. It was agreed on all hands that the cost of the proposed new building was about \$30,000, making the total amount of rent to be paid for the ground and new building \$3,600 a year, the lessors demanding \$6,000 per annum for the first year and a larger sum thereafter (Rec., p. 6).

At the trial the appellee gave evidence tending to prove all the material allegations of the declaration (Rec., p. 7). The appellee offered the testimony of a large number of real estate brokers and hotel men to the effect that a new building to be erected upon the property in question would have rented for about \$6,500 or \$7,000 per year.

John F. Costello, who was experienced in rental values of hotel and saloon properties and the value of the properties themselves, testified that such a building as the

Costinettts agreed to erect, but which they refused to erect, would rent for \$500 or \$600 a month.

William D. Sullivan testified that he was familiar with rental values in the neighborhood of the Union Station, in the city of Washington, and that such a building would rent for \$800 a month.

John D. Sullivan testified that the proposed new hotel would rent for \$6,500 or \$7,500 a year.

William A. Engel, who for many years conducted the Engel Hotel at the corner of New Jersey Avenue and C Street Northwest, in the immediate neighborhood of Union Station, testified that for at least three years of the lease the proposed new hotel would rent for \$6,000 a year, and after that for \$100 per month more.

Edwin H. Pillsbury testified that he had sold properties in the neighborhood of the Plaza Hotel saloon and that he was familiar with rental values of properties in that neighborhood, and that the proposed new hotel would fairly rent for \$6,500 or \$7,000 a year.

Alexander C. MacLennon testified that he was familiar with the rental values of hotel properties and had been connected with two hotels in Washington, D. C. He testified that the proposed new hotel would rent for \$7,000 or \$8,000 a year.

William J. Dugan testified that he had made a specialty of the sale of saloons and hotels and was for six years in the real estate business. He testified that he was familiar with the rental values in the neighborhood of the Plaza Hotel property and that it would rent for \$7,000 or \$7,500 a year.

Salvadore S. Richards testified that he was familiar with the rental values of small hotel properties and that this particular hotel would rent for \$7,000 a year.

The only defense offered by the appellants was that they never did agree with the Plaza Hotel Company upon plans and specifications except upon the express

stipulation that the Plaza Hotel Company instead of paying \$3,600 per year for the proposed new hotel, would pay \$7,200 per year (Rec., p. 12). Not only that, but that they should pay \$7,200 for the first year and an increased amount for the remaining years of the lease. It will thus be seen that the Costinetts themselves fixed the rental value of the proposed new hotel at the minimum price of \$7,200 per year.

II.

It appears from the record (p. 16) that the appellants rely upon ten assignments of error, which, however, can be grouped under two heads; first, what is the proper measure of damages in a case like the present, and second, was the proof offered by the appellee competent with relation to the true measure of damages?

The court below held (Rec., pp. 14 and 15) that the true measure of damages was the difference between the rental value of the land improved as the parties agreed it should be improved, and the rent reserved in the lease. The court further held that the testimony of the various witnesses as to what was the rental value of the land with the proposed new building upon it, was competent and admissible, but the court was careful to grant the fourth prayer requested by the defendants which will be found on page 14 of the record to the effect that in considering the value of the use of the premises, had there been erected a building thereon, the jury should reject all the testimony tending to prove that the business to be carried on would have been profitable. The appellants offered four prayers, all of which were granted except the second. In the first of these prayers the jury were told that unless they should find from the evidence that the parties agreed upon plans and specifications for the building to be erected under the terms of the lease, then the plaintiff could not recover and the verdict should

have been for the defendant. Having found for the plaintiff that question of fact, namely, whether the parties did actually agree upon plans and specifications, is forever foreclosed, it being admitted that there was ample proof to sustain the finding of the jury in that regard. The second prayer, and the only one that was rejected, was the request that the jury be told to find merely nominal damages. Upon what theory the appellants could hope to sustain such a request, it is difficult to conceive, except upon the theory advanced in the opposing brief that the mere fact that at the time of the execution of the lease the parties had agreed upon a certain rental, absolutely fixed the rental value of the property in dispute, and that no change in conditions could have justified a finding that the property had enormously increased in value and that, consequently, the rental value of the property had been increased. By the third prayer presented by the defendants below the jury were told that if they should find that the plans and specifications submitted by the Costinets in 1908 were not submitted under the condition of the lease, but with the condition that a fixed monthly sum should be paid instead of a percentage of the cost of the building in addition to the \$150 reserved in the lease, they should disregard the testimony as to such plans and should return a verdict for the defendant. In other words, the whole contention of the defendants below was that they had never agreed with the Plaza Hotel Company upon plans and specifications except upon the express condition that the hotel company should pay a much larger rental than what was fixed in the lease itself. As before stated, no explanation was given at the trial and none is offered here to show why the Costinets deliberately violated the agreement which they themselves had entered into. The court will take judicial notice of the fact that the erection of the Union Station in the city of Washington

has revolutionized conditions in that neighborhood and has made an enormous change in property values. On page 14 of the opposing brief, the statement is made that this particular neighborhood was barren of hotels, and this language is italicised. As a matter of fact, it affirmatively appears from the record that the Engel Hotel is only a short distance from the location of the Plaza Hotel property and as the statement thus made is wholly gratuitous and not supported by any evidence in the record, we make the statement that there are two very large hotels in the immediate neighborhood of the property in dispute, the Continental Hotel and the Harris Hotel, the latter hotel being directly across the street from the Plaza Hotel property.

Taking up in their order the only two questions presented by this record, we respectfully submit the following:

III.

The True Measure of Recovery in an Action Like the Present is the Difference Between the Rental Value of the Property in Dispute, if Improved, as Had Been Agreed Upon, and the Rent Reserved in the Lease.

It has seemed to us that this proposition is so elementary that it hardly admits of serious discussion.

In the plaintiff's declaration (Rec., p. 2), the covenant entered into between these two parties is set out *in extenso*, and is as follows:

"If at any time during the continuance of this lease the grade of North Capitol Street, or the grade of F Street, or the grade of Massachusetts Avenue, where they pass said premises, shall be changed, then in such case, the parties of the first part agree, upon the request of the party of

the second part, to erect upon the premises aforesaid, No. 600 North Capitol Street, and Nos. 1 and 3 F Street Northwest, a new building according to plans and specifications to be hereafter agreed upon between the parties to this lease, and from and after the date of the completion of said new building, the party of the second part agrees to pay to the parties of the first part during the unexpired portion of said term of eight years and six months, in lieu of the rent hereinbefore provided, the sum of one hundred and fifty dollars (\$150) per month as rent, and also an additional amount, that is to say, a sum of money equal to six per cent (6%) on the amount of money expended in the erection and completion of said new building. Said six per cent on said expenditure to be divided into twelve equal instalments, one of which shall be payable monthly in addition to the one hundred and fifty dollars (\$150) rent hereinbefore agreed to be paid."

The execution of this covenant is admitted on all hands, and yet in the face of that sealed instrument, the Costinetts absolutely refused to live up to their agreement, and not only that, but as will appear from the record, page 12, instead of erecting the new building to cost \$30,000, and receiving from the Plaza Hotel Company \$1,800 a year reserved in the lease, plus \$1,800 additional, which is six per cent upon \$30,000, or a total annual rent of \$3,600, actually demanded \$600 per month or \$7,200 per year, exactly twice the rent that they agreed to take, and thereby by themselves, give the strongest kind of testimony as to what the new building with the changed conditions, would reasonably have been worth. An examination of the record will disclose that every witness produced by the Hotel Company was either a real estate broker or a hotel man, familiar with rental values in this neighborhood. Not a single one of these witnesses was asked as to whether the business to

be conducted on this property would have been profitable or not. Counsel was careful to ask each one of these witnesses not whether the business would have been profitable or not, but what would such a building on such a particular piece of property have reasonably rented for. For example: John F. Costello (Rec., p. 7) was asked the following question: "Q. It is in evidence here that it was proposed to put up a hotel building on that corner containing 39 sleeping rooms, together with the ordinary rooms in the basement and main floor, barroom and restaurant, bathrooms, etc., four stories in height, to cost in the neighborhood of \$30,000.00 to be built of brick. What would you say, beginning with July or August, 1908, such a building as that would rent for reasonably for the purpose of a hotel and bar?" Objection being made to that question, the trial court made the following ruling: "The Court: If you amend the question and ask him if he knows what would be the fair rental value he may answer." The question was amended as suggested by the court and the witness answered: "I should say it would rent for \$500 or \$600 a month," the latter figure being exactly what the Costinets themselves demanded. It will be observed that this witness was not asked whether the business to be conducted on this property would have been profitable or not, but was simply asked what the building would rent for. He had previously qualified himself by stating that he was a real estate broker and had some experience in rental values, and the values of hotels and saloon properties and was familiar with the premises in question. Certainly, the witness had qualified himself to the extent of making his evidence admissible for the consideration of the jury, who were entitled to give it such weight as they thought it was entitled to.

Subsequently, the same question was asked of the witnesses, William D. Sullivan, of John D. Sullivan, the

latter of whom says that he had been a real estate broker for twenty-three years and had all the experience that goes with the business (Rec., p. 8). He further stated that he had experience in renting properties in the neighborhood of Union Station—that is to say, small properties. He was asked what would a piece of property such as has been described rent for. He was not asked whether a hotel and barroom in that neighborhood would have done a profitable business, or whether it would have lost money; he was simply asked what would such a building rent for. If such proof as this is incompetent, it is impossible to prove the rental value of any piece of property. The witness, William A. Engel, for many years conducted a hotel at the corner of New Jersey Avenue and C Street Northwest, a point about three squares south of the Plaza saloon. He was asked what would be a fair rental value for the Plaza Hotel property, judging from his experience in the hotel and barroom business in that particular neighborhood. The witness, Edwin H. Pillsbury (Rec., p. 10), stated that he had been a real estate broker for ten years, that he had sold certain properties in the neighborhood of the Plaza saloon, and that he was familiar with the rental values of the property in that neighborhood. He testifies (Rec., p. 10) that the fair rental value of that property improved as contemplated by the parties would be from \$6,500 to \$7,000 a year, the latter figure being within \$200 of Mr. Costinett's own estimate. Alexander C. MacLennon, another witness called by the plaintiff, testified that he had been in the hotel business since 1880 and had been in the hotel business in Washington City for six years, in which place he was connected with two hotels, one of them being the Occidental Hotel, bounding the New Willard on the west, and the other at 715 Thirteenth Street Northwest. He was asked particularly if he was familiar with the rental value of

hotel properties in this city and answered that he was in a way. The question asked him was, "What in your judgment would be a fair rental value that such a property would command, say for a six and half year lease running from August, 1908," and so it was with the witness, Wm. J. Dugan (Rec., p. 11), and the witness, S. S. Richards (Rec., p. 12). The latter witness testified (Rec., p. 12) that he was familiar with the rental values of small hotel properties and his estimate was \$7,000 a year. Mr. Dugan's estimate was from \$7,000 to \$7,500 per year. Mr. Dugan (Rec., p. 11) says that he had made a specialty of the sale of saloons and hotels and was for six years in the real estate business. He stated that he knew the Plaza saloon property, and that he was familiar with rental values in that locality.

As opposed to this mass of testimony, the only proof offered by the appellants was a denial on their part that they had ever agreed upon plans and specifications except with the condition attached that the Plaza Hotel Company should pay \$7,200 per year or \$600 per month, and the other fact that the rentals usually obtained from business properties in the city of Washington were and are between 5 and 6 per cent upon the value of the property after deducting taxes and other charges paid by the landlord, such charges being generally not more than $1\frac{1}{2}$ per cent. There is no statement in the record as to what the Plaza Hotel property was worth after the change of grade of the three streets that surrounded it, so that there is no way of estimating what 5 or 6 per cent of the value of the property would be except the mere statement that in 1908 the plaintiff had offered to buy the property from the defendants and that said defendants offered to sell the same for \$30,000, which price the plaintiff declined to pay.

The court is respectfully referred to the following decisions as bearing upon the question as to the true meas-

ure of recovery or the true measure of damages in a case like the present.

The measure of damages is the difference in value of the use of the premises as they are and as the owner agreed to put them.

Cook vs. Soule, 56 N. Y., 420. In that case, which was an action to recover rent, the lessee set up by way of counter-claim the lessor's breach of his covenant to repair. Proof was offered and admitted to show what the premises would have rented for if in repair, and the court held the rule of damages to be as we contend for.

A tenant can not recover of the landlord profits which he might have made or losses which he might have avoided, but only the difference between the rental value of the property as it was and what it would have been if the repairs had been made, taking into consideration the purpose for which the property was to be used.

Bien vs. Hess, 102 Fed., 436.

In this case proof was admitted to show what the property would have rented for if the covenant to repair had been kept.

See, also, the case of *Winne vs. Kelley*, 34 Iowa, 339, where the court drew the distinction between prospective profits and rental value.

To the same effect is *Milling Co. vs. Hewitt*, 86 Wisconsin, 270.

Bostwick vs. Losey, etc., 67 Mich., 554.

In the ordinary case of a lease of a building to be used for any purpose at the discretion of the lessee and there has been a breach by the lessor of a covenant to repair, the rule which measures the damages by the difference in general rental value is usually compensatory and in most cases best satisfies the demand of justice.

Thomson vs. Durant Co., 144 N. Y., 48.

It can not be said that the stipulated price in the lease absolutely indicates the rental value of the building. . . . It may be some indication of market value, but it can not go any farther than that. . . . If the damage by loss of rental value is \$1,000, and the amount agreed to be paid for the use of the house is \$500, it is plain that the actual damage to the lessee is \$500.

Kohne vs. White, 12 Wash., 199.

Taylor vs. Lehman, 17 Indiana App., 585.

In the case of *Hexter vs. Knox*, 63 N. Y., 561, the court expressly held that the rule of damages is as we contend for, and nowhere in its opinion places its decision upon the ground that part of the hotel in controversy was actually in use.

See, also, *Ganson vs. Tift*, 71 N. Y., 48, where the court held that while future profits could not be recovered for the true measure of damages was the difference between the rental value of the property as it was and what it would have been if the warehouse had been rebuilt.

See, also, *Berrian vs. Olmstead*, 4 E. D. Smith, N. Y., 279.

IV.

The Testimony Offered by the Plaintiff Below Was Competent to Show the Reasonable Rental Value of the Property Had the Proposed New Building Been Erected.

It is true that this evidence was opinion evidence; it could not have been anything else. The best evidence, of course, of rental value is what the property actually rents for, but in this instance the proposed new building was never erected, through no fault of the appellee. The only way, therefore, in which the fact of rental value

could be proved was by the evidence of persons familiar with such matters, namely, real estate brokers and hotel men. In the opposing brief, it is stated that the lease itself reserved a rental of \$120 per month. This is a mistake; the rent reserved in the lease being \$150 per month. It is argued that because the price of the proposed new hotel structure would have been 6 per cent upon \$30,000 plus \$150 per month reserved in the lease, or \$3,600 in all, the rental value of the new hotel could not, under any circumstances be more than that figure.

We submit that no authority can be found to sustain this contention.

In the case of *Kohne vs. White*, 12 Washington, 199, above referred to, the court pointed out that the lessee may have rented the property for less than its value, or for more than its value, and that the price stipulated in the lease can not absolutely indicate the rental value of the property.

In the case of *Swift vs. Newport News*, 105 Virginia, 108, it was held that opinion evidence is admissible upon the question of the effect upon the market value of property of a change in the grade of a street on which it abuts.

In the numerous condemnation proceedings that have been had in the Supreme Court of the District of Columbia, in the past ten years, many of which have come to this court on appeal, opinion evidence has constantly been received to show the value of the ground proposed to be taken and the rental value of such property. It is difficult to understand how any other evidence could be produced upon the subject.

Upon the main question here involved the court is referred to the following authorities:

Sedgwick on Damages, 9th Edition, section 993, where the authority lays down the rule as follows: When the

lessor covenants to make improvements on the land and fails to do so, the measure of damages would ordinarily be the difference in rental value of the premises with the improvements and without it. A large number of cases are cited in support of this proposition.

And further that where an increased rent was to be paid for, the improvements, the tenant can recover the difference between such increased rent, and the additional value because of the improvements.

Berrian vs. Olmstead, supra.

In the case of *Oliver vs. Bredl*, 25 Penn. Superior Court, 653, the court said: "The plaintiff is entitled to recover the difference between the rental value of the premises with and without the addition covering the period running from May 1, 1901, to the date of trial, November 9th, 1903, a period of 30 $\frac{1}{4}$ months. The question of damages and the only question of damages you are to pass upon, if you get to the question at all, is the difference in the rental value before and after, or the property as it was in its old condition, and its value as affected by the addition, if the addition had been in proper shape. The measure of damages for a breach of contract is the difference between the actual performance and the performance contracted for, in the present case the difference in rental value between the property as actually constructed and as the lessor agreed to construct it."

V.

Authorities Cited in the Opposing Brief.

In the case of *Kelley vs. Dutch Church*, 2 Hill, 105, the action was brought under a covenant for quiet enjoyment where the lessee was evicted by a superior

title without any fault on the part of the lessor. In the present case the action was brought for damages for positive breach by the lessor or his covenant to rebuild. The fact that he made such covenant is established conclusively by the verdict of the jury.

In the case of 97 Penn., 120, C leased to A for 99 years. After C's death, his widow obtained an assignment of dower out of the property. It was held that A was entitled to recover the costs of defending the suit against the widow's claim. Manifestly, this case is not in point.

In the case of *Lanahan vs. Heaver*, 79 Maryland, 413, it was held that the plaintiff could not recover for loss of profits expected to be derived from the sales of the completed buildings in the absence of evidence as to whether the houses would ever have been sold, as to when they would have been sold, and as to what price they would have brought. We have expressly disclaimed any idea of claiming any damages for loss of profits that the Plaza Hotel Company might have made from the operation of the proposed new building.

In the case of *Wakeman vs. Wheeler*, 101 N. Y., 205, it is held that there could be no recovery for the loss of prospective profits on the sale of a number of sewing machines.

In the case of *Central Coal and Coke Company vs. Hartman*, 111 Fed., 96, so much relied upon by appellants, the court said just before the beginning of the citations on appellant's brief at page 7, "the only damages claimed in the petition and the only losses which the plaintiff sought to prove at the trial were the loss of some of the expected profits of his business of buying and selling coal between January 1, 1897, and June 25, 1899."

Without pursuing the subject further, we submit that the only cases that can be found where the right of the

plaintiffs to recover the difference in rental values between the unimproved property, and the property as agreed to be improved are those cases where uncertain prospective profits were sought or where tenant was evicted by a paramount title.

It is respectfully submitted that there is no error to be found in the record and that the judgment appealed from should be confirmed.

GEORGE F. HAVELL,
MICHAEL J. COLBERT,
For Appellee.

